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No. 08-1392

IN THE

Supreme Court of the United States

NIMATALLAH SHAFIK MASSIS,
Petitioner,

v.

ERIC HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents do not dispute that petitioner Massis is not deportable as charged, but they claim that no court has the power to vacate Massis's removal order on appeal because Massis's first lawyer (erroneously) conceded his deportability at his initial removal hearing. There is a deep circuit split as to whether 8 U.S.C. § 1252(d)(1) deprives courts of jurisdiction to review unexhausted issues. Massis's related claim that his lawyer's erroneous concession amounted to ineffective assistance of counsel also raises an important question—whether the Due Process Clause provides protection against ineffective assistance of counsel in re-

moval proceedings—that has divided the circuits. Both issues warrant this Court's review.

I. THE CIRCUITS DISAGREE ON WHETHER ISSUE EXHAUSTION IS A JURISDICTIONAL REQUIREMENT

There is a widespread split among the circuits regarding whether 8 U.S.C. § 1252(d)(1) creates a jurisdictional bar to judicial review of unexhausted issues. Pet. 11-20.[1] Respondents do not dispute the disagreement among the circuits. Instead, they focus on ancillary arguments irrelevant to this Court's consideration of the jurisdictional question.

Respondents first argue (Opp. 10, 17-19) that the Fourth Circuit's decision does not widen the conflict because the government did not waive the exhaustion requirement below. But whether the government in fact waived the exhaustion requirement only begs the legal question to be resolved by this Court: whether Section 1252(d)(1) imposes a jurisdictional issue-

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[1] The Second and Seventh Circuits have held that Section 1252(d)(1) does not deprive courts of appeals of jurisdiction to review issues not raised before the IJ and the BIA. *See Lin Zhong* v. *DOJ*, 480 F.3d 104, 121-122 (2d Cir. 2007); *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 670-671 (7th Cir. 2005). Nine other circuits have come to a different conclusion, but of those nine, five permit or have discussed prudential exceptions, suggesting their "jurisdictional" rule is not truly jurisdictional. *See, e.g., Batrez Gradiz* v. *Gonzales*, 490 F.3d 1206, 1209-1210 (10th Cir. 2007). And three of the nine have implied their prior precedent erred in construing Section 1252(d)(1) as imposing a jurisdictional issue exhaustion bar. *See, e.g., Lin* v. *Attorney Gen. of the U.S.*, 543 F.3d 114, 120 & n.6 (3d Cir. 2008). Even within these circuits, there is significant confusion. *See* Pet. 13 n.6; *see also Mambwe* v. *Holder*, 572 F.3d 540, 550 (8th Cir. 2009).

exhaustion bar.[2] If it does, then the government's failure to argue exhaustion is of no consequence, for the court of appeals would have been obliged to find itself without jurisdiction. Indeed, because the court of appeals ruled that it lacked jurisdiction to consider Massis's legal challenge to his removal order, it did not consider either the waiver question or Massis's argument that his removal would result in a miscarriage of justice. But if this Court were to hold that Section 1252(d)(1) is not a jurisdictional issue-exhaustion provision, then (and only then) would it be necessary to consider the circumstances (including government waiver) under which the Fourth Circuit, or any other court, might exercise its jurisdiction to consider an issue conceded below.

Equally unavailing is Respondents' reliance on *Bowles* v. *Russell*, 551 U.S. 205 (2007). As Massis has explained (Pet. 25-26), *Bowles*, if anything, suggests that issue exhaustion is properly understood as a nonjurisdictional "claims-processing rule," not a true jurisdictional rule that restricts a court's *power* to decide a case. Moreover, the circuit conflict has persisted after *Bowles*: although some of the "jurisdictional" circuits have relied on *Bowles* to maintain their jurisdictional approach, *see, e.g.*, *Omari* v. *Holder*, 562 F.3d 314, 324 (5th Cir. 2009), the "nonjurisdictional" circuits have since reaffirmed their position, *see, e.g.*, *Cisneros-Cornejo* v. *Holder*, 330 F. App'x 616, 618 (7th Cir. 2009); *Singh* v. *Mukasey*, 294 F. App'x 668, 669 (2d Cir. 2008). Some panels in the "jurisdictional" circuits have also continued to question circuit precedent that Section

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[2] Respondents' argument that the government did not waive the exhaustion requirement below is also wrong. *See* pp. 7-8, *infra*.

1252(d)(1) is jurisdictional in nature. *See Hoxha* v. *Holder*, 559 F.3d 157, 159 n.3 (3d Cir. 2009); *Manani* v. *Filip*, 552 F.3d 894, 900 n.4 (8th Cir. 2009). The circuit conflict remains unresolved after *Bowles*, and this Court's review is needed to clarify whether courts of appeals have jurisdiction to consider unexhausted issues.[3]

II. THE FOURTH CIRCUIT ERRONEOUSLY CONCLUDED IT LACKED JURISDICTION TO CONSIDER MASSIS'S LEGAL CHALLENGE TO HIS DEPORTABILITY

Massis has shown (Pet. 20-29) that the Fourth Circuit's decision is incorrect in two respects: (1) Section 1252(d)(1) does not speak to *issue* exhaustion at all but requires only that the alien proceed before the agency before seeking judicial review—ordinary issue exhaustion rules therefore apply; and (2) ordinary exhaustion rules are not jurisdictional, and therefore the reviewing court has the power to consider issues not presented (or conceded) below in certain limited circumstances. Respondents offer no meaningful response to these points.

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[3] Respondents' reliance (Opp. 19) on *Valenzuela Grullon* v. *Mukasey*, 509 F.3d 107 (2d Cir. 2007), *cert. denied*, 129 S. Ct. 43 (2008), is unavailing. In *Valenzuela Grullon*, the petitioner failed to appeal to the BIA altogether, and the Second Circuit held that it lacked authority to excuse the petitioner's failure to exhaust *remedies* as required by Section 1252(d)(1). *Id.* at 112, 115-116. *Valenzuela Grullon* did not address the separate question of *issue* exhaustion presented here.

A. Respondents Improperly Conflate The Remedy Exhaustion Required By Section 1252(d)(1) With Issue Exhaustion

Respondents make no attempt to rebut Massis's showing (Pet. 20-24) that Section 1252(d)(1) does not mandate *issue* exhaustion, and that such a rule should not be presumed from the statute's requirement that an alien exhaust administrative remedies before seeking judicial review.[4] Respondents instead conflate Section 1252(d)(1)'s remedy-exhaustion requirement with issue exhaustion. They argue, for example (Opp. 13), that Massis "implicitly concedes" that the statute "requires at a minimum that an alien first present his claim to the IJ and that he then pursue his claim on appeal to the Board." But Massis simply acknowledged that, under Section 1252(d)(1), an alien may not bypass the BIA altogether, *i.e.*, by failing to appeal to the BIA at all—not that the statute requires a petitioner to raise in the agency each issue presented in his petition for review. *See* Pet. 20-24.

Respondents also argue that BIA *regulations* require issue exhaustion. Those regulations do not resolve the issue in this case. The regulations do not speak in jurisdictional terms, *see* 8 C.F.R. 1003.3(b), thereby admitting the possibility of prudential exceptions, and, in any event, only Congress has the power to determine federal court jurisdiction, *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004); *see also Lin Zhong* v. *DOJ*, 489

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[4] Respondents claim that this case does not involve "mere issue exhaustion" because Massis "*conceded*" before the immigration judge that he is deportable. Opp. 14 (emphasis in original). But they do not explain what difference that makes in interpreting Section 1252(d)(1).

F.3d 126, 132 (2d Cir. 2007) (Calabresi, J., concurring in denial of reh'g en banc). It is therefore up to the courts to decide whether they may review unexhausted issues, and on that question the circuits are deeply divided.[5]

B. If Issue Exhaustion Is Not A Jurisdictional Requirement, Then It May Be Waived Or Overlooked

Respondents argue (Opp. 14) that, even if Section 1252(d)(1) does not impose a jurisdictional issue-exhaustion requirement, issue exhaustion would still be "mandatory" and thus preclude Massis's deportability argument. This argument is flawed on multiple grounds.

First, Section 1252(d)(1) does not address issue exhaustion, and thus does not make it mandatory as a statutory matter. *See Lin Zhong* v. *DOJ*, 480 F.3d 104, 121 (2d Cir. 2007). By contrast, the two cases cited by Respondents (Opp. 14) concerned specific rules, which, even if not jurisdictional, were mandatory. *See*

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[5] Respondents' citation of *United States* v. *Broce*, 488 U.S. 563 (1989), adds nothing. In *Broce*, this Court held that two criminal defendants could not collaterally challenge their voluntary and counseled plea agreements. The Court stressed the procedural protections unique to the criminal context, including the hearing and plea colloquy required by Federal Rule of Criminal Procedure 11, to ensure that a guilty plea is voluntary and knowing. *Id.* at 570. Massis, of course, did not have these protections in his civil removal proceedings. Moreover, the *Broce* Court noted that the defendants were advised by constitutionally competent counsel. *Id.* at 574. By stark contrast, the Fourth Circuit held that Massis did not have a constitutional right to effective assistance of counsel at the immigration hearing where Massis's lawyer conceded his deportability. Pet. App. 13a-14a.

Greenlaw v. *United States*, 128 S. Ct. 2559, 2564-2567 (2008) (rule that government appeal or cross-appeal a criminal sentence); *Eberhart* v. *United States*, 546 U.S. 12, 18 (2005) (per curiam) (time limit in procedural rule).

Second, even if issue exhaustion were mandatory, it would still be subject to waiver by the government. *See, e.g., Lin Zhong*, 489 F.3d at 132; *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 670-671 (7th Cir. 2005). Respondents waived exhaustion in this case—or, at least, a court could readily so conclude. Respondents admit that their *only* specific mention of the statute was in the last footnote of a motion to dismiss filed more than two years before the parties briefed the merits of the case to the Fourth Circuit. Opp. 16 (citing Resp. C.A. Mot. 14 n.5 (filed June 10, 2005)). Raising exhaustion in a footnote was insufficient to preserve the point even for purposes of that motion, let alone going forward. *See, e.g., IGEN Int'l, Inc.* v. *Roche Diagnostics GmbH*, 335 F.3d 303, 309 n.3 (4th Cir. 2003).[6] And in their merits brief, Respondents did not even cite Section 1252(d)(1); they merely noted Massis's concession of deportability and then asserted without analysis that it was "improper" for Massis to collaterally attack his concession. Resp. C.A. Br. 12.[7] Massis argued in his

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[6] *See also Universal City Studios, Inc.* v. *Corley*, 273 F.3d 429, 445 (2d Cir. 2001) ("[W]e have repeatedly ruled that arguments presented to us only in a footnote are not entitled to appellate consideration."); *United States* v. *Dairy Farmers of Am., Inc.*, 426 F.3d 850, 856 (6th Cir. 2005) (same).

[7] Respondents' failure to press exhaustion in their merits brief confirms their waiver. *See Hillman* v. *IRS*, 263 F.3d 338, 343 n.6 (4th Cir. 2001) (failure to comply with FRAP 28(b), which, by reference to FRAP 28(a)(9)(A), requires a merits brief to contain

reply brief that Respondents waived exhaustion, *see* Pet. C.A. Reply Br. 1, but the Fourth Circuit did not reach the issue once it concluded that Section 1252(d)(1) imposed a jurisdictional issue-exhaustion requirement.

Moreover, even apart from waiver, other exceptions to ordinary principles of issue exhaustion should apply here. In particular, courts have recognized an exception to prevent an injustice that would otherwise result. *See* Pet. 28-29. The miscarriage of justice in Massis's case is particularly compelling for at least three reasons. First, it is undisputed that Massis is not removable as charged.[8] The government did not argue in the Fourth Circuit that Massis is removable as charged, and does not so argue in this Court.[9] Second,

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the appellees' "contentions and the reasons for them," results in waiver of that argument on appeal).

[8] Even were it disputed, an exception to exhaustion would be warranted where, as here, no facts are in dispute and the issue is purely legal.

[9] Respondents argue (Opp. 19 n.5) that decisions confirming Massis's nondeportability post-date his 1998 removal hearing. Maryland case law making clear that reckless endangerment does not require the use of force, however, predates Massis's hearing. *See* Pet. 4. Moreover, this Court's decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), interpreting a "crime of violence" to require as an element or by its nature the use of force or a substantial risk thereof, is fully applicable to Massis's case, which was pending at the time of that decision. *See United States* v. *Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005); *see also Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994) (explaining that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction"). Certainly, Respondents do not contend that if Massis had preserved his legal challenge to his deportability before the agency, he would not be entitled to relief. Although Respondents suggest (Opp. 19 n.5) that Massis would be

Massis challenged his deportability before the BIA when he timely sought reopening to prevent a miscarriage of justice, thereby fulfilling the purposes of exhaustion by providing the BIA with an opportunity to consider the issue in the first instance. *See* Pet. 6; CAJA 331-333.[10]

Finally, Respondents have suggested that, even if Massis had raised this deportability argument in the BIA on direct appeal, the Board could not have considered it. *See* Opp. 3 (citing *Matter of In Ku Kim*, No. A047-413-659, 2009 WL 2370858 (BIA July 22, 2009)). If true, this makes the case for judicial consideration of Massis's argument even more compelling. Otherwise, an erroneous concession of removability could *never* be examined on appeal—by either the BIA or a court—before a lawful permanent resident is removed.

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independently deportable under 8 U.S.C. § 1227(a)(2)(E), they never made that argument before, and for good reason: that provision is inapplicable to cases, like this one, that arose before its enactment. *See Matter of Gonzalez-Silva*, 24 I. & N. Dec. 218 (BIA 2007). In any event, the only relevant question is whether Massis is deportable *as charged*.

[10] Respondents have no answer to Massis's showing (Pet. 29) that an alien can exhaust an issue by raising it in the BIA in a motion to reopen. And Respondents wrongly suggest (Opp. 20) that Massis did not raise the issue in his motion to reopen. The motion to reopen, cited throughout Massis's merits brief in the Fourth Circuit, argued that his conviction for reckless endangerment did not constitute a deportable "aggravated felony" as charged. *See* Pet. C.A. Br. 11; CAJA 323-327. Notably, the government in response engaged Massis on the merits of his deportability argument, never suggesting that Massis failed to exhaust the issue. Supp. AR 28-44.

III. THE PETITION PROPERLY PRESENTS THE QUESTION WHETHER EFFECTIVE ASSISTANCE OF COUNSEL IN REMOVAL PROCEEDINGS IS PROTECTED BY THE FIFTH AMENDMENT

Respondents contend (Opp. 24) that this Court should not resolve the sharp conflict among the circuits about whether aliens in removal proceedings have a right under the Due Process Clause of the Fifth Amendment to effective assistance from their retained counsel because "[j]urisprudence on the issue is still developing in the courts of appeals." That submission is misguided. While the Fourth and Eighth Circuits have answered the question in the negative, *see Afanwi* v. *Mukasey*, 526 F.3d 788, 799 (4th Cir. 2008), *vacated and remanded*, No. 08-906, 2009 WL 3161844 (U.S. Oct. 5, 2009); *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008), other circuits have remained firm in their position to the contrary.[11] No further development in the circuits would aid the Court on this question.

Respondents also argue (Opp. 25) that resolution of the constitutional question would not aid Massis because, it contends, the court of appeals concluded that

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[11] Respondents' reliance (Opp. 24-25) on dicta in a footnote to a recent Ninth Circuit opinion, *Alcala* v. *Holder*, 563 F.3d 1009, 1015 n.11 (9th Cir. 2009), to suggest otherwise is mistaken. The Ninth Circuit has consistently reaffirmed its view post-*Afanwi* that the Due Process Clause encompasses a right to effective assistance of retained counsel during removal proceedings. *See Torres-Chavez* v. *Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009); *Ahmed* v. *Mukasey*, 548 F.3d 768, 771 (9th Cir. 2008). Other circuits also continue to adhere to their pre-*Afanwi* positions. *See, e.g.*, *Fustaguio do Nascimento* v. *Mukasey*, 549 F.3d 12, 17 (1st Cir. 2008); *Kapic* v. *Holder*, 321 F. App'x 49, 51 (2d Cir. 2009); *Richardson* v. *United States*, 558 F.3d 216, 223 n.7 (3d Cir. 2009).

his first counsel was not ineffective. But the Fourth Circuit applied a relaxed abuse-of-discretion standard to review the BIA's rejection of Massis's ineffective-assistance claim; it did not consider whether Massis's counsel provided *constitutionally* ineffective assistance. Pet. App. 11a-13a.

Moreover, although Respondents theorize (Opp. 25) that Massis's first counsel made a tactical decision to concede deportability and instead seek a form of discretionary relief under Section 212(c) of the INA, that speculation finds no basis in the record. To the contrary, Massis's concession took place before *INS* v. *St. Cyr*, 533 U.S. 289 (2001), held that Section 212(c) relief remained available to aliens pleading guilty before that statute's repeal. As a direct result of Massis's erroneous concession of removability, the IJ told Massis that he was statutorily *ineligible* for Section 212(c) relief[12]—a ruling that took Massis years to overturn. It therefore strains credulity to view Massis's concession as some kind of advantageous legal strategy. Furthermore, it was unnecessary for his counsel to choose between contesting deportability and requesting a Section 212(c) waiver, as aliens in removal proceedings routinely pursue both avenues of relief. Pet. 33 n.16.

This case thus presents an appropriate vehicle to resolve the deep circuit split on whether aliens have a constitutional right to effective assistance of counsel in removal proceedings.

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[12] CAJA 14 ("[M]y decision based on the law is that there is no relief available to you. You must be deported.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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